INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Argument	10
Conclusion	16
Appendix	17

CITATIONS

Cases:

Atchley v. *Tennessee Valley Authority*, 69 F. Supp. 952	12
Dalehite v. *United States*, 346 U.S. 15	15
Feres v. *United States*, 340 U.S. 135	15
Grant v. *Tennessee Valley Authority*, 49 F. Supp. 564	12
Jones v. *United States*, 207 F. 2d 563, certiorari denied, 347 U.S. 921	14

Statutes:

1928 Flood Control Act, Sec. 3 (Act of May 15, 1928, 45 Stat. 534, 535, 536, 33 U.S.C. 702c	10, 11, 18
Act of June 28, 1938, Sec. 8 (52 Stat. 1215, 1226, 33 U.S.C. 706)	19
1346	17
2674	15, 17
2680	13, 18
2680(a)	14, 15
2680(h)	13, 14

Miscellaneous:

H. Rept. 1092 on H.J. Res. 341, 82d Cong., 1st Sess., p. 6	10
Hearings before the House Committee on Public Works, 82d Cong., 1st Sess., on the Destructive Floods in Kansas and Missouri, July 31, 1951:	
p. 2	8-9
p. 111	9
p. 113	9

Miscellaneous—Continued:

Page

Kansas-Missouri Floods of July 1951, Geological Survey Water-Supply Paper 1139:

p. 1 8
p. 2 8
p. 11 10
p. 213 9

Kansas-Missouri Floods of June-July 1951, Weather Bureau Technical Paper No. 17:

p. 6 8
p. 74 10
p. 75 10

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 660

NATIONAL MANUFACTURING COMPANY ET AL.; GREAT WESTERN PAINT MANUFACTURING CORPORATION; MID-CENTRAL FISH COMPANY; WESTERN MERCANTILE COMPANY; COUCH TRACTOR AND EQUIPMENT COMPANY; AND CHARLES P. SHIPLEY SADDLERY & MERCANTILE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri, Western Division in *Western Mercantile Company* v. *United*

States is reported at 111 F. Supp. 799 (R.N. 11-13).[1] Its opinion in *Mid-Central Fish Company* v. *United States* is reported at 112 F. Supp. 792. The District Court's orders dismissing the *National Manufacturing Company* case (R.N. 13-14), *Shipley Saddlery & Mercantile Company* case (R.S. 1-2), *Great Western Paint Manufacturing Corporation* case, and *Couch Tractor and Equipment Company* case are not reported.[2]

The opinions of the Court of Appeals in all six cases (R.N. 21-51 and R.S. 12-42) are reported at 210 F. 2d 263.

JURISDICTION

The judgments of the Court of Appeals in all six cases were entered on February 8, 1954 (R.N. 52-54; R.S. 42). A petition for rehearing was denied in the *Shipley Saddlery & Mercantile Company* case on March 5, 1954 (R.S. 55). The petition for a writ of certiorari in all six cases was filed on March 27, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

These suits were instituted under the Federal Tort Claims Act to recover damages for property destroyed or damaged at petitioners' places of business in Kansas City in the course of the Kansas

---

[1] As in the Petition, R.N. will refer to the *National Manufacturing Company* record and R.S. will refer to the *Shipley Saddlery & Mercantile Company* record.

[2] The District Court's opinion in the *Mid-Central Fish* case and its orders in the *Great Western Paint Manufacturing* and *Couch Tractor and Equipment* cases are not printed in the record.

River flood of July 1951. The claim was that the Weather Bureau and other governmental flood prediction and forecast services had (1) negligently assured petitioners, immediately prior to the flood, that the river would not overflow, and (2) negligently failed to give petitioners sufficient warning and notice of the impending overflow in time for them to remove their movable property from the flood area.

The question presented is whether, in the light of the Flood Control Act of 1928 and the express exceptions contained in the Federal Tort Claims Act, petitioners have stated claims for which relief may be afforded under the latter Act.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act, of the Flood Control Act of 1928 (45 Stat. 534, 535, 536, 33 U.S.C. 702c), and of the 1938 Act establishing a weather and river-stage forecasting and prediction service (52 Stat. 1215, 1226, 33 U.S.C. 706), are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

Petitioners filed these six suits under the Federal Tort Claims Act to recover damages from the United States for property destroyed or damaged at their places of business in Kansas City, Missouri, as a result of the Kansas River flood of July 1951. Five cases (*National Manufacturing Company, Great Western Paint Manufacturing Corporation, Mid-Central Fish Company, Western Mercantile Company,* and *Couch Tractor and Equipment Com-*

pany) were based on the two claims that the Weather Bureau and other federal agencies (1) negligently assured petitioners, immediately prior to the flood, that the river would not overflow, and (2) negligently omitted and failed to give petitioners sufficient advance notice and prediction of the disaster so as to enable them to remove their merchandise from the flood area (R.N. 31; R.S. 22). In the sixth case (*Shipley Saddlery & Mercantile Co.* v. *United States*), only the second claim was asserted (R.N. 31; R.S. 22).

1. *Proceedings in the District Court and the Court of Appeals.*

The first five complaints asserted that the Kansas River, a navigable stream subject to federal jurisdiction, flows into the Missouri River at Kansas City (R.N. 3); that the United States, through the Weather Bureau of the Department of Commerce, the Army Engineers, and other governmental agencies, made regular surveys and forecasts concerning the waters of the Kansas River and its rise and fall (R.N. 3); that these agencies knew that their reports are relied on by the public generally, and by petitioners in particular (R.N. 4); that on July 9, 1951, the Kansas River entered flood stage (R.N. 4); and that thereafter the federal agencies (1) negligently published and broadcast misinformation concerning the course and action of the flood waters of the river, assuring petitioners that the river would not overflow, and (2) negligently omitted to publish and broadcast information that

the "Kansas River was reasonably certain to greatly overflow its banks and * * * dikes and levees" (R.N. 6). These complaints further alleged that, as the result of these negligent omissions and assurances by the government employees, petitioners were led "into the feeling of security that the said Kansas River would not overflow" and for that reason they "did not remove from the flood area the portable and removable goods and property" (R.N. 7). Damages to such property amounting to about a million dollars were claimed in the five complaints (R.N. 30; R.S. 21).

The complaint in the sixth case—the *Shipley* case—alleged that the Weather Bureau and other governmental agencies had a regular system for reporting river stages and rainfall and for "observing and predicting the movement of crests of high water" in the Kansas River (R.S. 3); that those agencies had assumed the duty to furnish flood warnings and information as to the river stages "to the plaintiff as well as to other members of the public" (R.S. 3); that the United States "negligently failed to warn" petitioner sufficiently in advance of the Kansas River flood so as to enable it to remove its property to a place of safety (R.S. 4); and that the resulting damage to petitioner's property amounted to $49,000 (R.S. 6, 20, 21).

The United States moved for summary judgment in all six cases on the ground that "the pleadings now on file indicate there is no genuine issue of fact and that the defendant is entitled to judgment as a matter of law" (R.N. 22; R.S. 6, 13).

The motions were granted and the six cases dismissed by three different judges. Judge Reeves dismissed the *National Manufacturing Company, Couch Tractor Company,* and *Western Mercantile Company* cases for the reasons set forth in his opinion in the latter case reported at 111 F. Supp. 799 (R.N. 11-13). Judge Ridge, in a separate opinion reported at 112 F. Supp. 792, dismissed the *Mid-Central Fish* case. Judge Duncan, relying on the *Western Mercantile* opinion, dismissed the *Great Western Paint Manufacturing* and *Shipley Saddlery & Mercantile Company* cases (R.S. 1-2).

The Court of Appeals affirmed all six judgments of dismissal (R.N. 52-54; R.S. 42). Pointing out that "the history of other legislation in the period immediately following the [July 1951 Kansas River] flood shows even more conclusively congressional opposition to the indemnification sought in the instant suits," the court's opinion holds that Section 3 of the 1928 Flood Control Act, 33 U.S.C. 702c, *infra,* p. 18, safeguards the United States against liability from damages caused directly or indirectly by floods or flood waters at any place throughout the country (R.N. 35, 38; R.S. 26, 29). The court further ruled that Section 3's basic concept of governmental immunity from all types of flood damage was in no way altered or repealed by enactment of the Federal Tort Claims Act in 1946, and that only an affirmative mandate by Congress in the Tort Claims Act directing the imposition of liability for such damage could justify a departure from the established

prohibition (in Section 3) against federal liability (R.N. 39; R.S. 30). Far from finding any such affirmative mandate, the court relied on the exclusionary provisions of the Tort Claims Act as additional reasons for barring the Kansas City flood claims. In this connection, the court pointed out that the claims were based on either negligent misrepresentations or their equivalent—the negligent withholding or refusal to warn of the impending flood or to make other representation—and hence barred by 28 U.S.C. 2680(h), and finally, that 28 U.S.C. 2680(a), the "discretionary" or "governmental" function exception of the Tort Claims Act, also barred the claims because (a) the flood forecasting and predicting service was a "governmental" activity for the benefit of the public at large and entirely disassociated from any private business counterpart, and (b) the wide latitude conferred by statute on the Weather Bureau in determining whether forecasting was advisable also made the "discretionary" function exclusion of 28 U.S.C. 2680(a) applicable (R.N. 41, 43; R.S. 32, 34).[3]

Judge Johnsen's concurring opinion emphasizes the bar of Section 3 of the 1928 Act and the nonliability for negligent dissemination of public information as "two fundamental grounds of nonliability here" (R.N. 47; R.S. 38). Judge Sanborn expressed his concurrence in Judge Johnsen's views (R.N. 51; R.S. 42).

---

[3] Judge Woodrough's opinion is the opinion of the court, as Judge Johnsen makes clear (R.N. 48; R.S. 39).

2. *Description of the flood.*

The record does not contain a description of the July 1951 flood on the Kansas River, but its nature and extent have been made plain by technical studies by the Geological Survey and the Weather Bureau. According to these studies, the flood was caused by torrential rainstorms of unprecedented intensity falling on ground that had been saturated by previous rains. *Kansas-Missouri Floods of July 1951,* Geological Survey Water-Supply Paper 1139, p. 1. During the months of May and June 1951, rain was reported each day from some observation station in Kansas. *Ibid.* Average precipitation in Missouri was 4.05 inches above normal. *Ibid.* In Kansas it was more than five inches above normal. *Ibid.* The June 1951 rainfall over Kansas was the greatest monthly average ever recorded. *Kansas-Missouri Floods of June-July 1951,* Weather Bureau Technical Paper No. 17, p. 6. For the 11-week period preceding July 1951, rainfall over portions of the Kansas Basin exceeded the normal *annual* total.

Heavy rains continued to fall during the first eight days of July 1951, on ground already sodden from the record-breaking rainfall of the previous two months. *Kansas-Missouri Floods of July 1951,* Geological Survey Water-Supply Paper 1139, p. 2. Beginning July 9, 1951, the long period of excessive antecedent rainfall was climaxed by three days of extremely heavy precipitation. Downpours of 5 to 15 inches fell in the same area. Precipitation of "12 inches in 72 hours," reported in central

and eastern Kansas, caused "terrific concentrations of runoff in Kansas streams." Hearings before the House Committee on Public Works, 82d Cong., 1st Sess., on the Destructive Floods in Kansas and Missouri, July 31, 1951, p. 2.

Unlike the usual flood pattern associated with heavy rainfall, the Kansas River flood failed "to follow history" in that it did not start at the headwaters of the river and then sweep downstream to its mouth at Kansas City. Hearings before the House Committee on Public Works, 82d Cong., 1st Sess., on the Destructive Floods in Kansas and Missouri, July 31, 1951, p. 113. The times at which crest levels reached official observation points along the Kansas River watershed "completely refutes any belief that the July 1951 flood followed the usual conception of flood crests moving downstream from headwaters to river mouths," devastating cities in its course. *Id.* p. 111. Thus, Manhattan, Kansas, although 21 miles further downstream than Randolph, Kansas, had its flood crest 10 hours before Randolph. *Id.* at p. 111. Flood crest at Junction City, 25 miles below Abilene, was reached 39½ hours before the flood crest hit Abilene. *Id.* at p. 111. And, at the mouth of the river at Kansas City, the flood-crest stage was reached 12 hours before Enterprise, which is "165 highway miles above Kansas City." *Id.* at p. 111; *Kansas-Missouri Floods of July 1951,* Geological Survey Water-Supply Paper 1139, p. 213.

Total property damage caused by the flood was estimated to exceed $935,000,000. R.N. 47; R.S.

38; *Kansas-Missouri Floods, June-July 1951,* Weather Bureau Technical Paper No. 17, p. 75.[4] The Greater Kansas City metropolitan district, consisting of Kansas City, Kansas, and Kansas City, Missouri, was damaged the most severely of any of the cities in the flood area. *Kansas-Missouri Floods of July 1951,* Geological Survey Water-Supply Paper 1139, p. 11. Kansas City's central industrial district alone, containing the concentration of stockyards, packing plants, warehouses, and manufacturing plants, suffered damages estimated at $140,000,000. *Kansas-Missouri Floods of June-July 1951,* Weather Bureau Technical Paper No. 17, p. 74.

ARGUMENT

The decision of the Court of Appeals in these Tort Claims Act cases is plainly correct. As noted in the opinions below, there are several independent and dispositive reasons for denying the claims. Some of these grounds are narrowly limited to flood cases of this precise type, and the broader grounds are in full accord with the rulings of this Court and of the other circuits.

1. The holding is firmly supported by the unambiguous language of Section 3 of the Act of May 15, 1928, 45 Stat. 534, 536, 33 U.S.C. 702c, *infra,* pp. 18-19. In precise language, Section 3 declares that:

---

[4] No natural catastrophe works such extensive devastation as a flood. The "average annual losses from flood damage in the United States have been estimated anywhere from 100 to 500 million dollars." H. Rept. 1092 on H.J. Res. 341, 82d Cong., 1st Sess., p. 6.

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

(a). No broader or more emphatic language could have been employed to exonerate the United States from flood-damage liability. The statutory language is unequivocal. The United States cannot be subjected to *any* kind of liability for *any* flood damage at *any* place. Congress undoubtedly knew that, unless the exculpatory language was cast in comprehensive terms, attempts would be made to restrict its scope. And, as observed by the court below, "Congressional anticipation" of such attempts resulted in the statute's use of broad, all-inclusive language. (R.N. 34; R.S. 25.) It is undoubtedly for that reason that Congress, in Section 3, expressly outlawed liability "of *any* kind." Congress made it clear that the statutory immunity extended not only to claims for damages proximately caused by floods or flood waters but also, as the court below noted, to claims where the floods or flood waters were only a "substantial" or "material" factor in destroying or damaging property (R.N. 34; R.S. 25). And Congress, instead of placing any geographical limitation on the statute's applicability, used the language "at any place," to make certain that the statute would be applied "uniformly and throughout the country" wherever flood damage might be sustained (R. N. 34; R. S. 25).

That the language of Section 3 prohibits re-

covery of the damages claimed by petitioners is apparent from the complaints. Five of the complaints concede, as they must, that the damages involved resulted from the fact that the "wares and merchandise [owned by the petitioners] were flooded and inundated by the flood waters and oil, mud, muck and debris carried therewith" (R. N. 7, 8). Likewise, the *Shipley Company* complaint acknowledges that the damages sought resulted when the Kansas River "flooded the * * * Central Industrial District and destroyed and damaged" that Company's personal property (R.S. 4, 5). These concessions, as the court below held, show that "the language of Section 3 plainly bars recovery against the United States." (R.N. 34, 38; R.S. 25, 29.)

(b). Congress has never departed from this "basic concept of nonliability" (R. N. 35, R. S. 26) adopted in the Flood Control Acts.[5] On the contrary, the legislative history of bills considered by Congress "immediately following the [July 1951] flood shows even more conclusively congressional opposition to indemnification [for the flood damage] sought in the instant suits." (See the excerpts from the government's brief incorporated in the opinion below as fn. 3, R.N. 35, R.S. 26). The

---

[5] It is also significant that, as the opinion below points out, while "Many attempts have also been made in the courts to impose liability upon the United States for flood damages * * * such claims have been uniformly rejected by the courts. *Bedford* v. *United States*, 192 U.S. 217; *Jackson* v. *United States*, 230 U.S. 1; *Sanguinetti* v. *United States*, 264 U.S. 146; *United States* v. *Sponenbarger*, 308 U.S. 256; *Goodman* v. *United States*, 8 Cir., 113 F. 2d 914." (R.N. 36-37; R.S. 27-28). See also *Grant* v. *Tennessee Valley Authority*, 49 F. Supp. 564, 566 (E.D. Tenn.); *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952, 954 (N.D. Ala.).

stark fact is, as shown by these excerpts, that these very claims were emphatically rejected by the Congress.[6]

2. Petitioners' claims are not cognizable under the Federal Tort Claims Act for the further reason that they fall within the express exceptions set forth in 28 U.S.C. 2680. The Court of Appeals relied on two of these exceptions which exclude from coverage claims based on negligent misrepresentations and claims based on negligence in the exercise of a "discretionary" or "governmental" function.

(a). The allegations of the complaints leave no room for doubt that the actions are based upon allegedly negligent misrepresentations in flood forecasting. They assert that the government employees "carelessly and negligently disseminated misinformation respecting the course and action of the flood waters"; that "as a direct result of negligent assurances" the petitioners "were misinformed"; and that "the [government] employees negligently and carelessly assured the plaintiffs" that the river would not overflow (R.N. 4-6).

But 28 U.S.C. 2680(h) excludes from the coverage of the Tort Claims Act "any claim arising out of * * * misrepresentation." Appendix, *infra*, p. 18. The word "misrepresentation" in Section

---

[6] Although more than a thousand cases are filed each year against the United States under the Federal Tort Claims Act, the instant suits seem to be the first and only attempts to obtain judgments against the United States on claims as to which Congress has earlier declared its express opposition. The usual pattern is the converse, *i.e.*, attempts to obtain legislative relief after judicial rejection of a claim.

2680(h), as emphasized by the court below, includes negligent as well as wilful misrepresentations (R.N. 41; R.S. 32). Accord: *Jones* v. *United States,* 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921. Thus, the instant claims, to the extent that they are based on negligent misrepresentation, are barred by Section 2680(h). In addition, as also pointed out by the court below, the claims are likewise "within the exception of section 2680(h)" to the extent that they are based on negligence in refusing to make any representation because "The purpose of excepting federal liability on account of negligent misrepresentation necessarily extends to negligent failure to represent which has the same effect as an affirmative misrepresentation" (R.N. 43; R.S. 34).

Petitioners endeavor to escape the impact of the bar of Section 2680(h) by contending that that section cannot be applied to purely "tort and negligence actions" but should be limited to cases "in the field of contract law" (Pet. 15). The obvious answer to this contention is that exactly the opposite is true. Section 2680(h) is part of the *Tort* Claims Act and cannot be brought into play *except* with respect to a tort action.

(b). The instant claims, being based on negligent acts or omissions governmental in nature, are also barred by the exception in 28 U.S.C. 2680(a), excluding from the scope of the Tort Claims Act claims

> * * * based upon the exercise or performance or the failure to exercise or perform a

> discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The purpose of this exception was to bar liability for activities which, like the flood forecasting service here involved, are governmental or discretionary in nature. Closely linked with this "governmental" or "discretionary function" exception is the Act's requirement that the United States may be held liable only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. This restriction to "like" circumstances reinforces Section 2680 (a)'s aim of prohibiting the imposition of liability upon the United States for activities undertaken in a special governmental context or in any circumstances differing markedly from those in which comparable private activities are carried on. If the activity is purely governmental and has no private counterpart, there can be no liability under the Federal Tort Claims Act, which by its terms is conditioned on the liability of a private individual in *like* circumstances. *Feres* v. *United States,* 340 U.S. 135, 141, 142; *Dalehite* v. *United States,* 346 U.S. 15, 26-28.[7]

Here, as the court below declared, the Weather

---

[7] Petitioners assert a conflict with *Dalehite* (Pet. 11). But the opinion below, far from conflicting, adheres strictly to this Court's interpretation of the pertinent sections of the Tort Claims Act (R.N. 45-46; R.E. 36-37). Nor is there any conflict with the three decisions of other courts of appeals which are cited at page 11 of the petition and which involve factual situations in no way relevant to the instant cases.

Bureau's flood forecast "service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is dissociated from any private business counterpart and is closely analogous to the action all governments must take against common enemies, foreign and domestic, or against plagues and epidemics and against conflagrations" (R.N. 45; R.S. 36). Section 2680(a) therefore stands as a bar to the instant claims.

CONCLUSION

The decision below is clearly correct and rests on alternative grounds, each of which is independently dispositive of petitioners' claims. There is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

APRIL 1954.

APPENDIX

1. The pertinent provisions of the Federal Tort Claims Act, as now codified in 28 U.S.C.,[8] provide:

Section 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

[8] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. (1946 ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U.S.C. (Supp. V) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869.

Section 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * *

2. The 1928 Flood Control statute, which prohibits its imposition of liability on the United States "for any damage from or by flood waters at any place", provides in pertinent part (Act of May 15, 1928, 45 Stat. 534, 535, 536, 33 U.S.C. 702c.

SEC. 3.

* * * * *

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the

purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

3. The statute permitting the Weather Bureau and the Army Engineers to establish a weather and river-stage forecasting and prediction service provides in pertinent part (Act of June 28, 1938, 52 Stat. 1215, 1226, 33 U.S.C. 706):

SEC. 8. That there is hereby authorized an expenditure of not to exceed $375,000 per annum, from any appropriations heretofore or hereafter made for flood control by the United States, for the establishment, operation, and maintenance by the Weather Bureau of a current information service on precipitation, flood forecasts, and flood warnings, whenever in the opinion of the Chief of Engineers and the Chief of the Weather Bureau such service is advisable in connection with either prelimi-

nary examinations and surveys or works of improvement authorized by the law for flood-control purposes, and the Secretary of War upon the recommendation of the Chief of Engineers is authorized to allot the Weather Bureau funds for said expenditure.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 296035 1328

INDEX

Statement 1
Argument 6

1. Title 33, U. S. C., 702 (c), Is Not a Bar to These Cases 6

2. The Causes of Action Pleaded Are Not Barred by Any Exceptions to the Federal Tort Claims Act of 28 U. S. C. 2680 10

3. An "Absolute Policy of Non-Liability" for Public Information 19

Conclusion 20
Certificate of Service 22

Table of Cases

Bachman vs. Railway, 310 Mo. 48 18
Banks vs. Morris Company, 302 Mo. 254 17-18
Berry vs. Emery Bird Thayer, 357 Mo. 808 17
Brash vs. City of St. Louis, 161 Mo. 437 18
Burns vs. North Chicago Rolling Mill, 65 Wis. 312, 27 N. W. 43 12
Clark vs. United States, (D. C. Ore.) 109 F. Supp. 213 7
Coates et al. vs. United States, 181 F. 2d 816, 19 A. L. R. 2d 840 ..... 7, 18
Costley vs. United States, 181 F. 2d 723 18
Dalehite vs. United States, 346 U. S. 15 ..... 14, 16, 17, 18
Dundon vs. New York, N. H. & H. R. R. Co., 67 Conn. 266, 34 Atl. 1041 12
Ellington vs. Rock Island, 45 S. W. 2d 105 18
Erie R. Co. vs. Stewart, (6 Cir.) 40 F. 2d 855 12
Ford vs. Wabash Ry. Co., 318 Mo. 723 18
Mid-Central Fish Company vs. United States, 112 F. Supp. 792 14-15

Platt vs. Union Pacific Railroad Company, 99 U. S. 48 7
Somerset Seafood Company vs. United States, (4 Cir.) 193 F. 2d 631 12
Stumpf vs. Panhandle Eastern Pipeline Company et al., 354 Mo. 208, 189 S. W. 2d 223 12, 17
U. S. vs. Feres, 340 U. S. 135 18
U. S. vs. Gray, 199 F. 2d 723 18
Union Trust Company of District of Columbia vs. United States, 113 F. Supp. 80 15-16, 18
United States vs. State Road Department of Florida, 189 F. 2d 591 18
United States vs. Yellow Cab Company, (1950) 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 18
Westaway vs. Chicago, St. P., M. & O. R. Co., 56 Minn. 28, 57 N. W. 222 12

AUTHORITIES CITED

50 Am. Jur., Statutes, Secs. 219, 337, Note 3, p. 331 9
97 Cong. Rec. 12637 8
97 Cong. Rec. 12646 8, 9
97 Cong. Rec. 12648 9
Sec. 313, Title 15, U. S. C. A. 4
Senate Report No. 1196, Section 402, p. 7, 77th Congress, Second Session 10-11
45 Stat. 534, 33 U. S. C. 702(c) 7
28 U. S. C. 2674 13
28 U. S. C. 2680(a) 13, 20
28 U. S. C. 2680(h) 10, 11, 12, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 660.

NATIONAL MANUFACTURING COMPANY ET AL.; GREAT WESTERN PAINT MANUFACTURING CORPORATION; MID-CENTRAL FISH COMPANY; WESTERN MERCANTILE COMPANY; COUCH TRACTOR AND EQUIPMENT COMPANY; and CHARLES P. SHIPLEY SADDLERY & MERCANTILE CO., *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

STATEMENT.

Respondent's Brief in Opposition (Pages 8, 9, and 10), headed "Description of Flood," is entirely outside of the record in the instant case. This description is obtained

from various selections from respondent's own publications and *ex parte* statements made by the respondent long after the occurrence and is highly argumentative. However, it may serve one valuable purpose for this Court at this time, in that, as shown by the opinion of the Court of Appeals (R. N. 21-51 and R. S. 12-42) that body in carrying these facts forward into its opinion, was apparently misled and ignored the only true facts which were to be considered by it in passing upon the motion for summary judgment, namely, the facts as pleaded in the Plaintiffs' Complaints.

The only possible purpose of this description set forth in Respondent's Brief is to emphasize the flood on the Kaw River and to distract the Court from the plaintiffs' allegations of fact, namely the facts pleaded showing the negligence of the river stage employees of the Government. To argue *ex parte* statements of fact on motion for summary judgment, where only the allegations of the complaint are to be considered, is highly irregular. Respondent's Brief makes a point of the extraordinary rainfall during May and June, 1951, and states that "for the eleven week period preceding July, 1951, rainfall over portions of the Kansas City basin exceeded the normal *annual* total" (Respondent's Brief, Page 8). Petitioners are prepared to show that the employees of the Government negligently failed to consider the river stage stations up river from Kansas City. The water was on the ground by noon on July 12, 1951, and these Government employees knew the run off approached one hundred per cent, knew the speed of the flowing of the river to Kansas City, the capacity of the channel, and therefore they had to know that the quantity of water was such that of necessity twenty (20) hours later the Kaw River would go over the dikes and inundate the Central Industrial District of Kansas City and damage

the complainants' portables unless they issued their flood warning—for this very purpose they were employed and paid by the taxpayers, including complainants but they negligently failed in their prescribed duties.

The Respondent "argues" at Page 9 of its "Statement" that the Kaw or Kansas River flood "failed to follow history" in that it did not start at the headstream of the river and sweep down stream to Kansas City. This is apparently an attempt to sustain the Court's rulings on respondent's motion for summary judgment by excusing the negligence of the employees of the Government on the basis of what the Government may expect to assert as the "facts" of the case, and all regardless of the truth or falsity of the *ex parte* statement the Government has made in the Brief. The fact of the matter is the river forecasters were negligent in their failure to properly compute the effect of the tributary run-off at given points along the river when the river was already in the flood stage. The one simple fact is that the employees of the Government were negligent as alleged in the complaints in not giving the flood warning, when, of necessity, as much as twenty (20) hours before the flood occurred, they had the actual facts and data available by which they knew that the flood would occur at Kansas City at the time it did occur.

Likewise, the assertion in respondent's "statement" at Page 9 that "total property damage caused by the flood was estimated to exceed $935,000,000" is a repetition of the "argument" made in the Court of Appeals and apparently embraced by the court (R. N. 47 and R. S. 38) There has never been any contention on the part of these appellants that the Government is liable under the Federal Tort Claims Act for the total "flood damage" of this flood, but the complaints are restricted to the loss of portable goods

which could and would have been removed to a position of safety except for the negligence of the Government's employees. Damages to fixed structures and otherwise inevitable and unpreventable "flood damage" are not the subject of these actions and only serve to cloud the issue with an appeal to the Court to deny liability, not on the merits of the case, but because of a grossly inflated idea of the possible financial exposure of the Government.

The Court has apparently been misled in stating in its opinion that the Weather Bureau employees hired to warn of a flood "were exercising a discretionary function"; that their acts "were governmental in nature"; were "an information service for the public at large for governmental purposes discretionary in nature; they are vested by the statute with wide latitude of discretion to determine whether 'in (their) opinion such forecasting is advisable' "; that this is a "dissemination or nondissemination of public information"; that this employment of these governmental employees to give a flood warning was on the basis of whether they would "talk or fail to talk" and that it was within their discretion so to do—that is, the court below has overlooked the basic facts in this case, as pleaded, which for the purpose of considering a "Motion for a Summary Judgment" must be conclusively presumed to be true, to-wit:

(a) The Weather Bureau (as early as 1870) was established to give "Flood Warnings" and had assumed this statutory duty to give same (R. S. 3-5). Sec. 313, Title 15, U. S. C. A.

(b) The Weather Bureau had employed persons of skill to do this, knowing that persons (including appellants) would rely upon such flood warnings (R. S. 3-5).

(c) That as early as July 12, 1951, some 20 hours before the flood occurred the employees of the Government had facts and knowledge available to them which definitely and conclusively showed that the Kansas River would greatly overflow its dikes on the 13th of July, 1951, in the Kansas City Industrial District (R. S. 4 and R. N. 5).

(d) These employees were so negligent and careless that although they had the knowledge as aforesaid they failed to give the warning, but in addition their carelessness and negligence went further in that they, for some time before and on the morning that the water went over the dikes and levees, issued bulletins that there would be no flood and that the waters would not go over the dikes (R. N. 6).

(e) That as a direct consequence of this negligence as aforesaid the petitioners were deprived of the opportunity to remove their merchandise and portable effects out of the path of the flood and were thereby damaged as charged in the respective complaints (R. N. 6).

A reference to the complaints will show that nothing in the nature of a "forecast," that is, an opinion as to whether or not it might rain, is involved. There was no hazarding of a guess. It was not a question of whether the employees should "talk or fail to talk," or that it was within their discretion, having been employed to give the flood warning as to whether they gave it or not.

Respondent's argument that the complaints were nothing but "flood damage claims" was apparently successful in the Court below. Review of the complaints and of the record in these consolidated cases should show the fallacy of this line of reasoning. Except for the negligence of the employees of the Government the complainants here would

have removed their portable goods and they would have not suffered any loss in such connection and their claimed loss is solely that amount which was caused by the negligence of the employees of the Government.

ARGUMENT.

Petitioners, having in mind the Court's rulings as to the brevity limitation of a petition for certiorari, did not develop in detail the specifications of error in support of the Petition for a Writ of Certiorari. Detailed argument on these points, it was felt, should be reserved to the brief on the merits of the case after the Court has considered whether or not certiorari should be granted.

The argument here in opposition to certiorari is apparently that the court below must have been right in at least one of its grounds for dismissal and that therefore this Court should not review the decision. On the contrary, the effect upon the law of the land by the Appellate Court's approval of all of the various positions of the Government necessarily and purposely restricts all future claimants as well as those involved in the present litigation to a very narrow and exception-ridden interpretation of the Federal Tort Claims Act.

In order to show the type of presentation which would be made in the brief on the merits in opposition to the various contentions of the Government as set out in their brief herein, we briefly advance a skeleton reply to each of the arguments of the Government:

1. Title 33, U. S. C., 702 (c), Is Not a Bar to These Cases.

(a) In seeking a way out from the liability imposed generally by the Federal Tort Claims Act for damages

resulting from the negligence of the employees of the Government, the researchers in the Department of Justice hit upon an old 1928 statute, *45 Stat. 534, 33 U. S. C. 702(c)* (set forth in the appendix of the petition herein at pages 20 and 21). This appealing loophole for avoiding liability was not discovered and used with any immediacy by the Department of Justice, for in earlier cases which involved losses in flood waters, the contention of the bar of the Flood Control Act was apparently not advanced. For example, in the earlier Eighth Circuit case of *Coates et al.* v. *United States,* 181 F. 2d 816, 19 A. L. R. 2d 840, no mention is made of this alleged bar. It was apparently not until the Government began defending the case of *Clark* v. *United States,* (D. C. Ore.) 109 F. Supp. 213 (now on appeal, 9 Cir.), that this statute was invoked as a bar to liability under the Federal Tort Claims Act. Its application since the passage of the Tort Claims Act has never been passed upon by this Court, and certainly in view of the wide-sweeping fundamental philosophical change in the concept of governmental liability for negligence, it is fitting that this Court, and no other, decide whether a statute, passed as a part of a flood control bill almost twenty years before the passage of the Tort Claims Act exempting the United States for damage from or by flood or flood waters in connection with an Act to condemn land and erect dikes, etc., under its *Mississippi River* flood control program, should be construed as a bar to an action for negligence under the Tort Claims Act.

A short answer to this contention is that this Act could only mean and could only apply to any recovery which could have been had at the time of the 1928 statute when no tort recovery was allowable and only contract actions against the Government were available. *Platt* v. *Union Pacific Railroad Company,* 99 U. S. 48. Congress cannot be

convicted of the incongruity of passing an act to outlaw tort recovery, when Congress knew at the time that no recovery could be had under tort law. The only right to relief then was for unlawful taking of property and other possible contract actions, and, those rights were enforced through the Court of Claims or by means of private bills in Congress. To say that because the Congress did not specifically repeal a section which had nothing to do with tort actions at the time it was passed cannot, subsequent to the passage of the Tort Claims Act, be construed now to be a bar against suits for damage because of the negligence of Government employees.

(b) One of the strongest indications of the non-discerning type of adoption of the Government's position by the court below is the inclusion in the opinion by Judge Woodrough (R. N. 35) of the various statements from the Government's brief in connection with the political activities in Congress after the 1951 flood. See opinion below (R. N. 35-37) quoting in footnote 3 from the Government's brief below. Typical of the misleading character of the quotations from the Congressional Record is Congressman Nerrell's statement about the indemnity program not being authorized (R. N. 36). The quotation does not finish the Congressman's paragraph wherein he explains as follows *why* it was not authorized (or fully considered at that time (97 Cong. Rec. 12637)):

> "The Committee on Appropriations ought not to start it (indemnification). If we want to start it, we ought to do it through the Legislative Committee in the usual legislative way."[1]

---

[1]The opinion, and the Government's brief from which it was taken, is further misleading when it says the "House * * * defeated the amendment (97 Cong. Rec. 12646)" in regard to Congressmen Bolling's and Scrivner's amendments to the Committee's

Moreover, the indemnification portion of the Congressional amendments was to include real and fixed as well as personal and movable property and was to be paid without regard to the causal relationship of the negligent flood warnings of the Government agents.

Such arguments have no legal significance in determining the intent of Congress in passing the Tort Claims Act five years before. After the passage of the act, it was for the courts to interpret it, using such Congressional considerations as are deemed important to find Legislative intent, but subsequent political debates in Congress on entirely different matters are completely irrelevant. *50 Am. Jur., Statutes, Secs. 219, 337, Note 3, p. 331.* The mere fact that Congress did not pass complete indemnification relief after the 1951 flood, but saw fit to grant only first aid or a "hand out" to the people in the area who had lost their homes, does not indicate that Congress was even considering and certainly was not denying the liability of the United States for negligence causing part of this damage. Congress had already passed this function to the courts by the Tort Claims Act.

The total estimated flood damage repeatedly referred to by the respondent throughout its brief included thou-

---

reported disaster relief bill. *The Chair (not a vote of the House at all)* sustained a point of order objecting to the amendments as beyond the scope of the disaster bill then under consideration (Cong. Rec. 12646 and 12648).

Congressman Bolling stated immediately before his amendment was held to be out of order by the Chair (Cong. Rec. 12646):

> "I had hoped that no point of order would be raised against this so that the House as a whole could act on the merits of the case as a whole. It is clear that the subcommittee and the full Committee on Appropriations found against that case. The reason given is that it contains legislation on an appropriations bill. That, also, is the point of order."

sands of homes, buildings, and other immovable structures, which damage was uninfluenced by the negligent acts of the Government agents. No recovery is sought for damages to such immovable structures. Footnote 5 of Respondent's Brief again reflects the success which the Government achieved below in its concerted attempt to make the cases at bar erroneously appear to be actions for recovery for general "flood damage."

Seven cases are cited in that footnote (and in the opinion below) on the proposition "that many attempts have been made in the Courts to impose liability upon the United States for flood damages, but such claims have been uniformly rejected by the Courts." But in no one of these cases is there any situation comparable to that set up here, and in none of those seven cases have the Courts relieved the Government from liability since the adoption of the Federal Tort Claims Act, because of any contention that the Mississippi Flood Control Act supersedes the Federal Tort Claims Act.

2. The Causes of Action Pleaded Are Not Barred by Any Exceptions to the Federal Tort Claims Act of 28 U. S. C. 2680.

(a) The exception of Section 2680(h) is as follows:

> "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

A brief reference to the report from Congress on this section of the tort claims bill is of extreme importance in showing the fallacy of the broad definition of "misrepresentation" urged by the Government and adopted by the court below. *Senate Report No. 1196*, Section 402, p. 7,

77th Congress, Second Session, makes the following pertinent report:

> "The other exemptions from the scope of the bill, listed in Section 402, relate to certain Governmental activities which should be free from the restraint of damage suits or in respect of which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matters, the assessment or collection of taxes and assessments, the detention of goods by Customs officers, admiralty and maritime torts, *deliberate torts, such as assault and battery; and some others*" (Emphasis supplied).

It is obvious that the Congress had in mind nothing more nor less in the exemptions in Section 2680(h) than the deliberate torts, such as assault and battery, misrepresentation, and deceit.

Respondent has quoted certain words from the argument in the petition for the writ at page 15 in which we make the point that the deliberate torts involved in 2680(h) of misrepresentation and deceit are founded in the field of contract law and should not be applied to purely negligence actions. The element of deliberate and intentional torts barred by 2680(h) was clearly the intentional overt action of an employee—in order that the Government would not be required to be behind his action to defend tort claims for him. It is not negligence but the form of action (undoubtedly taken from the common law forms of action) involved that characterizes these particular excepted torts. To carry respondent's argument to the logical conclusion, one must say that if a suit was brought under the Tort Claims Act for the negligence of a truck driver causing damages and injury and the allegation was that the truck driver signalled to turn right and then

turned left, he would, according to respondent, be charged with "misrepresentation" to other drivers on the road and that therefore a negligence action in tort would not lie because of the 2680(h) exception.

Other cases[2] involving negligent warning and founded in the law of negligence rather than in the law of fraud, misrepresentation, and deceit are reserved for discussion in the brief on the merits.

The Government's employees were here manning "the watchtowers," as it were, along the Kaw River for the specific purpose of registering the crests of the river, the rainfall, the capacity of the channel and speed of the water flow and, having that information as pleaded to be the fact by the complainants, it was the duty of the watchmen at the watchtower to give the warning. These watchmen are no different than employees in a radio tower in an airfield, or at stations of a fire alarm system, or crossing watchmen or like men set up for warning service along a railroad, or lighthouse keepers, signalling ships to enter port, etc. The negligence of these Government employees in failing to give the warning is no different in legal significance than the failure of any employees of any of the services suggested, and many more will occur to this Court, so that the Appellate Court was clearly misled in disregarding the whole line of cases which hold that persons who have assumed a duty to warn and negligently

---

[2]*Stumpf* v. *Panhandle Eastern Pipeline Company et al.*, 354 Mo. 208, 189 S. W. 2d 223; *Erie R. Co.* v. *Stewart*, (6 Cir.) 40 F. 2d 855; *Burns* v. *North Chicago Rolling Mill*, 65 Wis. 312, 27 N. W. 43; *Westaway* v. *Chicago, St. P., M. & O. R. Co.*, 56 Minn. 28, 57 N. W. 222; *Dundon* v. *New York, N. H. & H. R. R. Co.*, 67 Conn. 266, 34 Atl. 1041; *Somerset Seafood Company* v. *United States*, (4 Cir.) 193 F. 2d 631.

perform that duty are accountable at law for the damage thus caused by their negligence.

(b) The commonly denominated "discretionary function" exception in 28 U. S. C. 2680(a) to the Tort Claims Act, when read as the Government urges in conjunction with 28 U. S. C. 2674 (stating that the United States shall be held liable "in the same manner and to the same extent as a private individual under like circumstances"), does not support the following contention of the respondent (Respondent's Brief, p. 15):

> "* * * if the activity is purely governmental and has no private counterpart, there can be no liability under the Federal Tort Claims Act, * * *."

The Government by a very neat sleight of hand has attempted, and apparently has succeeded in the court below, to substitute the word "governmental" for the word "discretionary" in the Tort Claims Act exception, thereby making the decision in this case authority in all future cases for this startling proposition. Prior to the decision in this case, it was thought that such a blanket construction of the Act and its exceptions so as to forbid recovery in any activity which was of a governmental rather than a proprietary nature had been buried by the previous decisions of our Federal Courts. It now appears that this Court must clear up this erroneous position of the Government once and for all. If not, the decision of the court below in this case will be waved from the hilltops as a complete bar to every negligence action wherein the agency of the Government involved was performing "governmental" work (the Post Office Department, the Weather Bureau, the Army, etc.) as opposed to strictly proprietary functions of the Government. For instance, the court below made the following statement (R. N. 44-45):

> "If the activity is purely governmental, there can be no liability under the Act which by its terms is conditioned upon the liability of a private individual in like circumstances."

In support of their formula that "discretionary function equals governmental function," the Government erroneously cites the *Dalehite* v. *United States* opinion, 346 U. S. 15, 26-28 (Respondent's Brief, p. 15), and summarily advances in its Footnote 7 that the opinion below does not conflict with but "adheres strictly to this Court's interpretation" of the Tort Claims Act. In addition to the language of this Court in the *Dalehite* case, construing the meaning of discretionary function, cited in the petition at pp. 12 and 13, this Court definitely recognized that the fundamental meaning of discretionary function had nothing to do with governmental function, but that it was a distinction between a planning activity and an operational or identified task. Thus the Court said at page 42, 346 U. S.:

> "The decisions held culpable were all responsibly made at a *planning rather than operational* level and involved considerations more or less important to the practicability of the Government's fertilizer program" (Emphasis supplied).

The above distinction is directly in line with petitioners' position and shows the extent to which the respondent has gone to confuse the exception of discretionary function with the old and inapplicable distinction of governmental as opposed to proprietary function. The latter distinction has no applicability to the Federal Tort Claims Act and in fact all of the Government's argument here was made to the District Courts below and completely rejected by the Judges. The rejection was specifically set out by Judge Ridge in *Mid-Central Fish Company* v. *United States*, 112 F. Supp. 792, at page 795:

"Although Congress has provided in Section 2674, Title 28, U. S. C. A., that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. *Somerset Seafood Co.* v. *United States*, (4 Cir.) 193 F. 2d 631; *Cerri* v. *United States*, (D. C.) 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act,' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156 (and authorities cited therein).

"Let us concede in the instant case that the collection and dissemination of weather and flood data are governmental sovereign functions which a private citizen would never find himself discharging. Even though the question of private liability would, therefore, never arise under circumstances identical to those herein, that constitutes, in our view, no valid ground for denying recovery under the Act, as asserted by defendant. * * *"

This same contention of the Government was raised in a recent case in the District of Columbia and the analysis of District Judge Grim in the 1953 case of *Union Trust*

Company of District of Columbia v. *United States,* 113 F. Supp. 80, completely lays to rest the governmental function concept of immunity. The District Judge made short work of this argument and a reading of his opinion is very informative in regard to the fallacy of the whole argument made here by the Government.[3]

The Government well knows that if it can substitute the word "governmental" for the word "discretionary," it will be able to avoid liability at all levels whether in the planning stage or the operational stage. The opinion of the court below goes this far (R. N. 43-47) and the expressions from this Court's opinion in the case of *Dalehite* v. *United States,* 346 U. S. 15, cited therein in support of that position were clearly taken out bodily and without showing the context in which this Court used them in that opinion.

---

[3]In the *Union Trust Company Case, supra,* the Government raised the point that the control of air traffic is a function sovereign in character and hence purely governmental from which no liability could arise since there is no liability of a private individual "even remotely analogous to that." After citing a number of cases to show that governmental function no longer provides immunity, the court concludes, l. c. 84:

> "All of which leads to this: When the Government as here, takes upon itself the function—as it claims it must—of the regulation of air commerce and the responsibility, among other things, of regulating the flow of traffic at a public airport, the assumption of such a responsibility involves something further, namely, not only *an activity designed to be protective of the interest of that amorphous group known as the public as a whole, but that of individuals as well,* against potential hazards incident to *such performance and implicit in its undertaking.* And if injury or death results as a consequence of the negligence of its servants or agents so engaged, Congress has decreed that the mantle of *sovereignty which heretofore has protected it, falls from its shoulders and thus what was formerly at best an unenforceable moral obligation is thus transmuted into an actionable legal right.* And whatever exceptions there are, this is not one of them" (Emphasis supplied).

On petition for re-hearing in the *Dalehite Case, supra,* petitioners apparently advanced the fear that even so-called operational details of an act might be termed a discretionary function by reason of implications of the Dalehite opinion. This seems borne out by the obvious attempt of the Government to here so construe the opinion and by the opinion of the court below. Undoubtedly this Court felt that other courts and lawyers in a careful reading of the opinion would see through such an attempt. Now that the danger of such a construction is apparent, the petitioners respectfully urge that not only for the sake of the cases at bar but also for the purpose of clarifying the point for citizens and litigants in the years to come, this Court should clarify the misinterpretation of discretionary function which the Government has succeeded in getting the court below to apply.

In this connection, the Court overlooks the basic facts as pleaded here in the complaints. In adopting the erroneous view of the counsel for respondent that "flood warnings" constitute a service for the public at large for governmental purposes discretionary in nature and entirely dissociated from any private business counterpart." In fact, there are a number of private commercial firms furnishing comparable service to subscribers "in commerce and navigation." Western Union being one and Dr. Krick and associates being another. Many air lines have private meteorological services. Railroads have employees and facilities which are comparable. A hydrological engineer could furnish flood warnings. Therefore, the opinion goes against the law of Missouri of liability in this connection as established by a considerable line of cases in the Missouri Supreme Court.[4]

---

[4]*Berry* v. *Emery Bird Thayer,* 357 Mo. 808; *Stumpf* v. *Panhandle Eastern,* 354 Mo. 208; *Banks* v. *Morris Company,* 302 Mo.

The Appellate Court has misconstrued these cases and has gone contrary to the law that liability exists here as pointed out in *U. S.* v. *Feres*, 340 U. S. 135, for the reason that the negligence in this case is governed by the law of Missouri. A private person is clearly liable in Missouri after having assumed a duty to warn for any injury caused by his negligence in failing to warn.

It is for this basic misconception by the Appellate Court that it has failed to recognize the liability of respondent here and that its opinion is in conflict with:

United States v. *State Road Department of Florida*, 189 F. 2d 591.

Coates v. *United States*, 181 F. 2d 816.

Union Trust Co. v. *U. S.*, 113 Fed. Supp. 80.

U. S. v. *Gray*, 199 F. 2d 723.

Dalehite v. *U. S.*, 346 U. S. 15.

The authorities without exception state that while no liability attaches to a decision to exercise a discretionary function, once the discretion is exercised and the act undertaken, it must be performed without negligence or *liability does result*. *Costley* v. *United States*, 181 F. 2d 723.

The expression of this Court in *United States* v. *Yellow Cab Company*, (1950) 340 U. S. 543, 547-550, 71 S. Ct. 399, 95 L. Ed. 523, is particularly apropos to the Court's consideration of the various exceptions applied by the court below, l. c. 402-5:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. * * *
>
> "* * * * * * *

254; *Ellington* v. *Rock Island*, 45 S. W. 2d 105; *Bachman* v. *Railway*, 310 Mo. 48; *Brash* v. *City of St. Louis*, 161 Mo. 437; *Ford* v. *Wabash Ry. Co.*, 318 Mo. 723.

"* * * The proceedings emphasized the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."

3. An "Absolute Policy of Non-Liability" for Public Information?

Petitioners have searched in vain for any argument or citation in support of the novel and sweeping statement of law advanced by Judge Johnsen and endorsed by Judge Sanborn: "The absolute policy of non-liability in the gathering or dissemination of public information" (R. N. 49). We shall not split hairs as to whether this Delphic pronouncement was made by the court or merely a majority of the court. We simply quote Judge Sanborn (R. N. 51): "I am in complete accord with the views expressed by Judge Johnsen in his concurring opinion." *Caveat republica!* This new freedom of falsity is extended not only to the Government but to all private agencies as well—and whether "negligent or otherwise" (R. N. 49). Petitioners have made every effort possible (within the limits of decorous language) to elicit the Government's view on this startling proposition. We are met with blank silence. If the Government cannot or will not support and justify then it should disavow and repudiate this doctrine. Petitioners are aware of this Court's view that the denial of a writ does not necessarily indicate approval of the Circuit Court's opinion. We believe, however, that the Court is equally aware that the notation "certiorari denied" after a citation of authority unavoidably lends an aura to an opinion which carries great weight with the bar and the

lower courts. The Circuit Court has opened Pandora's box and from it will swarm the fly-by-night promoters of worthless securities among others. Human ingenuity and iniquity being what they are, there will be plenty of others.

CONCLUSION.

Petitioners respectfully urge the Court to look behind the bold statement of the Government that these are purely "flood damage claims." A statement of a cause of action or claim for relief for negligence of the employees of the Government is apparent once the smoke screen of the "flood damage claims" is pierced and the complaints are read in the light of this Court's decisions under the Tort Claims Act.

But this matter is of far greater importance than even the cases at bar, for it represents an opportunity for this Court to examine and clarify the law of the land under the tremendously important Tort Claims Act in regard to the following four particulars:

(1) The present applicability of the so-called bar of the Mississippi Flood Control Act of May 15, 1928.

(2) The limitations and the meaning of "misrepresentation and deceit" in the exception of Section 2680(h).

(3) The meaning and limitations of the "discretionary function exception" of Section 2680(a), and particularly whether this is synonymous with governmental function.

(4) Whether there is in fact any "absolute policy of non-liability" in the gathering or dissemination of information to the public, *i. e.*, such as flood warnings.

For the foregoing reasons and for those advanced in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

CLAY C. ROGERS,
of ROGERS, FIELD & GENTRY,
904 Bryant Building,
Kansas City, Missouri,

BYRON SPENCER,
of SPENCER, FANE, BRITT & BROWNE,
2000 Power and Light Building,
Kansas City, Missouri,

ROY K. DIETRICH,
of DIETRICH, TYLER & DAVIS,
1001 Dwight Building,
Kansas City, Missouri,
Attorneys for Petitioners.

GORDON LEONARD,
GEORGE E. LEONARD,
JAMES W. BENJAMIN,
EDWIN EARNSHAW, and
WILLIAM H. WOODSON,
Of Counsel.

Date: May 11, 1954.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing reply brief were served on the respondent by U. S. Mail, 1st class postage prepaid, to the U. S. Solicitor General, Department of Justice, Washington 25, D. C., this 11th day of May, 1953.

CLAY C. ROGERS.